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October 28, 2004

VIA HAND DELIVERY
The Honorable Randy Mitchell, Chairman
South Carolina Public Service Commission
100 Executive Center, Suite 100
Synergy Complex, Saluda Building
Columbia, South Carolina 29211

Re: Docket No. 2004-178-E
Application of South Carolina Electric & Gas Company for an Increase in Electric Rates and Charges
Our File No. 4381.203

Dear Chairman Mitchell:

On October 25, 2004, South Carolina Electric & Gas Company ("SCE&G") filed with the Chairman's Office (and served on all parties of record) a letter in which the Company described problems inherent in the Commission's proposed use of Mr. Scott Hempling as a consultant in the upcoming SCE&G Rate Case. Following that letter, the parties to this matter attended an on-the-record status conference with Staff. During that conference, the Commission's Counsel Jocelyn Boyd proposed that, to avoid running afoul of either the rules of court, or the Code of Ethics, Mr. Hempling's role would be redefined as observer during the hearing, and, if necessary, assistant to Ms. Boyd *only* in drafting any resulting order.

The Company acknowledged that Ms. Boyd's proposal struck a reasonable balance between competing issues and protected the sanctity of the Commission's decision-making process. Thus, to promote a timely resolution of this issue, the Company indicated it has no objection to Ms. Boyd's proposal.

Subsequently, Columbia Energy LLC ("Columbia Energy") and the Consumer Advocate for the State of South Carolina ("Consumer Advocate") responded in writing to SCE&G's original letter and the status conference. Their responses advance positions contrary to controlling law and inconsistent with Ms. Boyd's proposal. The Company disagrees with the analyses of both parties, and herein provides additional authority on the relevant issues. For the reasons stated in its October 25th letter, SCE&G believed and still believes Mr. Hempling should be precluded from acting as an expert advisor/hearing officer to the Commission in these proceedings.

I. The Role of "Hearing Officer"

Where, as here, the Commission sits in its capacity as a judicial body, the General Assembly has specifically acknowledged that Commissioners may require assistance in resolving

evidentiary or procedural questions. In 2004, the Legislature re-authorized and empowered the Commission to hire "hearing officers" to assist it in making nondispositive rulings. Prior to 2004, the Commission had this authority, but the statute did not provide guidance as to specific qualifications for hearing officers. S.C. Code Ann. § 53-6-60 (Supp. 1983). Senate Bill No. 208 provides that guidance. According to § 58-3-40,

> (1) [u]pon the request of any party or any commissioner, the commission may employ a hearing officer **who may hear and determine procedural motions or other matters not determinative of the merits of the proceedings and made prior to hearing; and, at the hearing, shall make all rulings on nondispositive motions and objections.** If qualified pursuant to item (3), a commission staff attorney may serve as hearing officer.
>
> (2) The hearing officer has full authority, subject to being overruled by the commission, to rule on questions concerning the conduct of the case and the admission of evidence, but may not participate in the determination on the merits of any case.
>
> (3) **The hearing officer must be an attorney qualified to practice in all courts of this State with a minimum of eight years' practice experience.** (emphasis supplied).

2003 S.C. S.B. 208, 2003 S.B. R. 183. This provision became effective on February 18, 2004, on the Governor's signature. (*See* § 12, "Time Effective" of the Act).

Here, the plain language of the above-quoted statute outlines two prerequisites for lawyers acting as hearing officers with the Commission: (1) they must be licensed to practice in South Carolina; and (2) they must have practiced for at least eight (8) years. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (S.Ct. 2000).

By the statute's plain terms, Mr. Hempling is precluded from holding any position, despite its title, in which he would rule on evidentiary or procedural matters in the upcoming SCE&G Rate Case because he is not "an attorney qualified to practice in all courts of this state with a minimum of eight years' practice experience."

II. Advice of Disinterested Experts

Both Columbia Energy and the Consumer Advocate cite Canon 3(b)(7)(B) for the proposition that "[a] judge may obtain the advice of a disinterested expert **on the law applicable to a proceeding** before the judge." (emphasis added). This is a very precise provision enabling a court to seek expert assistance on discreet questions of law with which the court may not have sufficient expertise to rule effectively. *Wright & Gold,* Federal Practice and Procedure: Evidence, § 6262. *See, e.g., In re Japanese Electronic Products,* 723 F.2d 238, *revers'd on other grounds.*

Further, SCE&G is informed and believes that Mr. Hempling does not meet the definition of a "disinterested expert." Mr. Hempling frequently advocates on behalf of independent power producers (wind energy), wholesale power purchasers, and consumer advocate interests on the issues of utility regulation and rate-making. SCE&G does not believe that he can reasonably be defined as "disinterested" or "neutral" for the purposes of this hearing, as his livelihood depends on advocacy on behalf of parties whose positions would, almost always, be adverse to those of SCE&G.

An identical issue concerning neutrality and *ex parte* communications was identified in *In re Kensington International Limited,* 368 F.3d 289 (3rd Cir. 2004). There, a federal judge was assigned five asbestos cases. Invoking the Federal Code of Judicial Conduct, Canon 3A(4), which is identical to SC Canon 3(b)(7)(B), the judge stated that the cases were extremely complex, and, over the objection of the parties, hired five experts, one to assist him with each case. Following numerous off-the-record exchanges between the "experts" and the judge, several of the companies moved to disqualify the judge on the basis that the advisors were not disinterested, and he had, thus, engaged in *ex parte* communications by consulting with them. The companies argued that "two court-appointed advisors. . .at the same time that they were supposed to be giving neutral advice in the [current asbestos cases] represented a class of tort claimants in another, unrelated asbestos-driven bankruptcy and espoused views therein on the same. . .issues. . .at the core of the [current cases]." The court concluded that

> two of the advisors. . . did, in fact, operate under a structural conflict of interests at the same time that they served as [advisors to the judge]. . . . On the one hand, [they] clearly had a duty to remain neutral in the Five Asbestos Cases and provide objective, unbiased information. . . . On the other hand, [they] also had a duty to act as zealous advocates for the future asbestos claimants in [their class action] bankruptcy. . . . Hamlin was at all relevant times the legal representative of the present and future asbestos personal injury claimants in the [class action] and Gross served as his local counsel. In those roles, Gross and Hamlin owed the future asbestos claimants . . . a fiduciary duty to advance their interests and to see that they received the greatest possible share of the bankruptcy estate. To achieve that end, the very Advisors who were advising Judge Wolin had to take positions. . . that favored the future . . . claimants. Gross and Hamlin signaled to all that they could not be non-partisan, benign, or neutral.

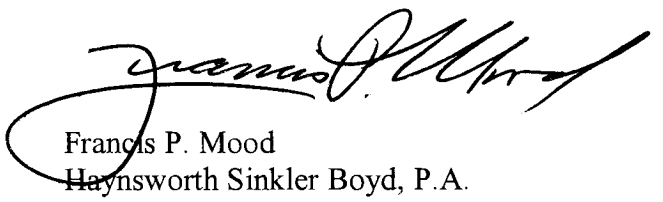
Id. at 301-303. Similarly, in this case, while Mr. Hempling may not be actively involved in any related matters before this Commission, he makes his livelihood advocating positions that are typically adverse to investor-owned utilities. Consequently, it would be nearly impossible for him to act here as a "non-partisan, benign, or neutral" advisor. (*See also, Mosley v. State of Texas*, 141 S.W.3d 816 (2004

The Commission has institutional knowledge and experience in the areas of utility policy and rate-making. In addition to the staff's experience, some of the current Commissioners were seated prior to Piedmont Natural Gas's 2002 Rate Case and SCE&G's 2002 Rate Case. The Commission did not require an outside expert in that or any other rate case, and nothing in the parties' current pleadings suggests that this proceeding will require expertise beyond that possessed by Commission and its staff.

As to the Commission's possible use of a "Court Witness", SCE&G relies on the content of its October 25th letter.

Respectfully Submitted,

Catherine D. Taylor



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cc: All Parties of Record

CERTIFICATE OF SERVICE VIA MAIL

I hereby certify that on October 28, 2004, a copy of South Carolina Electric & Gas Company's Letter to Chairman Randy Mitchell dated October 28, 2004, hand delivered to the Public Service Commission of South Carolina and transmitted either via facsimile or email to all parties of record as listed below:

F. David Butler, Esq.
Frank R. Ellerbe III, Esq.
Mr. Elliott F. Elam, Jr., Esq.
Scott Elliott, Esq.
Frank Knapp, Jr.
John F. Beach
Ms. Audrey Van Dyke, Esq.
Damon E. Xenopoulos, Esq.
Angela S. Beehler

Karen Scruggs

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